80-1985

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ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOSEPH M. KADANS,

Petitioner,

v.

SAMUEL S. LIONEL, FRANK FAHRENKOPF, HOWARD McKIBBEN, DAVID HAGEN, THOMAS BEATTY, Individually and as Members of the Nevada State Board of Bar Examiners, MAURICE SULLIVAN, Individually and as Executive Secretary of the State Bar of Nevada, CAMERON M. BATJER, E. M. GUNDERSON, JOHN MOWBRAY, GORDON R. THOMPSON, Individually and as Members of the Nevada Supreme Court, and DAVID ZENOFF, Individually,

Respondents

--oOo--

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH M. KADANS
5010 N. Ridge Club Drive
Las Vegas, Nv. 89103
(702) 873-4542

PETITIONER IN PRO SE

THE QUESTIONS PRESENTED

1. Whether the order of the district court, denying a motion to strike, was a final collateral order when it conclusively resolved an important issue completely separate from the merits of the action, was scandalous and impertinent, and the district court order had the obvious effect of foreclosing any hope of a favorable decision.

2. Whether there was an abuse of discretion by the district court in declining to issue a preliminary injunction under circumstances where irreparable injury was being inflicted due to violation of antitrust and civil rights laws, without danger to other parties and where there was an excellent likelihood of ultimately prevailing on the merits.

THE PARTIES

The parties to this proceeding are as listed in the caption of the case.

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SAMUEL S. LIONEL, FRANK FAHRENKOPF, HOWARD McKIBBEN, DAVID HAGEN, THOMAS BEATTY, Individually and as Members of the Nevada State Board of Bar Examiners, MAURICE SULLIVAN, Individually and as Executive Secretary of the State Bar of Nevada, CAMERON M. BATJER, E. M. GUNDERSON, JOHN MOWBRAY, GORDON R. THOMPSON, Individually and as Members of the Nevada Supreme Court, and DAVID ZENOFF, Individually,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Joseph M. Kadans, petitioner in pro se and a member of the bar of the Supreme Court of the United States since 1946,

prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on February 18, 1981 denying a petition for rehearing en banc, the said Court having previously decided in a memorandum opinion dated November 26, 1980 that the motion to strike was an interlocutory order and not appealable and that there was no abuse of discretion in the district court in declining to issue a preliminary injunction.

OPINION BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit dated November 26, 1980, has not been reported, but is set forth in its entirety in Appendix A. The order denying the petition for rehearing en banc, dated February 18, 1981 is set forth in Appendix B. Appendix C contains the order of the United States Magistrate denying the

motion to strike and Appendix D contains the order of the district court judge upholding the ruling of the magistrate and declining to issue a preliminary injunction.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit (Appendix A) was filed on November 26, 1980. That court's order denying a timely petition for a rehearing en banc (Appendix B) was entered on February 18, 1981.

The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Relevant sections of Title 28, United States Code include 1331 (Federal question jurisdiction), 1651 (all writs), 2201 (declaratory judgments),

1343(3) injunctive relief when deprived of federal rights and, under Title 42, United States Code, 1983 (injunctive relief), 1985(2) (conspiracy to deny civil rights), the due process and equal protection clauses of the Fourteenth Amendment and, under Title 15, the Sherman Act and particularly that portion of the Act known as the Clayton Act, dealing with antitrust conspiracies.

The Nevada Supreme Court has adopted a rule or regulation in connection with the selection and appointment of officers of the court (attorneys) known as Supreme Court Rule 51(4):

> "An applicant for examination for a license to practice as an attorney and counselor at law in this state shall: * * *
> 4. Have received a degree of bachelor of laws, or an equivalent law degree, from a law school approved by the committee on legal education and admissions to the bar of the American Bar Association."

STATEMENT OF THE CASE

Petitioner, who is now 68 years of age and who has practiced law honorably

without any bar association reprimands in the States of Maryland and Michigan for almost 20 years before moving to Nevada in 1962, has been seeking since that year to be admitted to the practice of law in Nevada. He has been denied the right to take the bar examination, ostensibly because of failure to meet the ABA law school requirement and, more recently, on the ground of lack of good character, but actually Petitioner contends that as a prospective competitor of high standing as a competent lawyer, the respondent attorneys and judges conspired to prevent Petitioner from qualifying to practice law in Nevada.

This view has been branded by the Respondents as "asinine" (by Mr. Morton Galane, acting on behalf of several of the Respondents at a public hearing in the district court) despite the fact that the late Justice Hugo L. Black has deplored the practice of allowing bar

admissions to "be turned over to the whim of their prospective competitors to determine their right to practice. I think the District Court did magnificent service in stripping the New York Bar of much of its unbridled power over the admission of new members. My only regret is that it did not strip it further." Justice Black stated further that "denial of admission should only take place after notice and hearing before an unquestionably impartial tribunal." (Dissenting in Law Students Research Council v. Wadmond, 401 U.S. 154.)

The fact that the Chief Justice of the United States is himself a graduate of a law school not approved by the ABA at the time of graduation (similar to the position of Petitioner) belies the argument that only graduates of ABA approved law schools are fit to practice law, an irrebutable presumption that this Honorable Court should strike down.

The essence of the case at bar is

that the Respondents herein have apparently conspired to deny to Petitioner his clear right to be admitted to the practice of law in Nevada, despite a clear showing of a spotless character, highly successful law practice for approximately 20 years before moving to Nevada and as a nationally known and respected law writer and lecturer.

The unbridled power of Respondents, including the application of terms such as "asinine" to the arguments of Petitioner in open court, the use of impertinent accusations concocted out of thin air, free use of deliberate misrepresentations and the use of principles derived from legerdemain rather than from law, have resulted in wrongs of incalculable magnitude to this Petitioner.

Appropriate action by this Honorable Court in the case at bar will very probably result in freedom from intellectual

slavery of many thousands and likely many millions of Americans seeking licensure from arbitrary and tyrannical state and semi-official agencies of the state acting under state-derived power.

Although acting by virtue of the judicial power granted to them under the State constitution, Respondents wrongfully assume that their actions in the selection or appointment of court personnel (court officers) are judicial acts and that they are therefore completely immune from any liability for their conduct in conspiring to deprive individuals such as the Petitioner herein from licensure.

After complaining in the Federal District Court of the actions of the Respondents, the Respondents made impertinent accusations of a scandalous and libelous nature in the pleadings and on a motion to strike the district court and later the United States Court

of Appeals for the Ninth Circuit refused to strike the scandalous and impertinent matter, the Ninth Circuit panel holding that this was not an appealable order.

On the contrary, the allowance of the scandalous matter to remain in the record conclusively resolved the entire case as the application of an attorney for state licensure cannot be successful when there is a question of good character.

It is a plain case of a litigant using a fraudulent representation to gain an objective and then pleading his own fraudulent act as a defense when called to account. This Honorable Court should not allow such a tacky tarpaper principle to stand among citadels of justice.

Likewise, pending final determination of the matter, Petitioner should have been granted his request for a temporary injunction to allow him to continue in his practice of law during the pendency of this litigation.

ARGUMENT

I.
THE DECISION DENYING STRIKING OF SCANDALOUS AND IMPERTINENT MATTER CONCLUSIVELY RESOLVED AN IMPORTANT ISSUE GOING TO THE HEART OF THE CASE

The recent decision of the United States Supreme Court in Firestone Tire & Rubber Co. v. Risjord, decided January 13, 1981, No. 79-1420, 49 LW 4089 made it clear that a district court need not label an order as "Final" in order for an appeal to be taken. The character of Petitioner, in a matter involving appointment as an officer of the court, is vital and unless the character is good, a bad character resolves an important issue completely separate from the merits of the action with regard to deprivation of due process or civil rights or even antitrust. Obviously, the motive for antitrust action by Respondents is lost where the person who is being restrained in his trade or occupation would be ineligible to serve as an officer of the court because of poor character. It is be-

cause the accusation of deficiency in character is without proof or foundation of any sort whatsoever that the Respondents herein have conspired to restrain Petitioner from engaging in his oppucation.

The case at bar clearly meets the criteria of Firestone, supra as the matter of character was too important an issue to be denied review. Also, it was too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

This Court has ruled long ago and the rule is still good law today that impertinent or irrelevant matter must be expunged from the record:

> "The allegation that the United States defrauded the Indians,and that the lands were sold below their value,and consequently that Fackler, having got his title by a fraud, was bound to commit the further fraud of keeping the complainants' money and the land too, might well have been expunged from the answer as 'impertinent' in every sense of the term." (Fackler v.Ford,et al, 65 U.S.322, at 330

The opinion of the Ninth Circuit panel indicates that Moore's Federal Practice, 1980 edition, was relied upon in holding that the order denying the motion to strike was not an appealable order. Evidently, the panel did not read the decision of this Court in Firestone, supra, decided January 13, 1981.

II.
THERE WAS AN ABUSE OF DISCRETION IN DECLINING TO ISSUE A PRELIMINARY INJUNCTION.

It is perfectly obvious that Petitioner will ultimately succeed on the merits in the case at bar in view of the facts as stated in the Amended Complaint. The Ninth Circuit has disregarded its own ruling in the case of Dymo Industries v. Tapeprinter, Inc., 326 F 2d 141 (1964) that where a litigant has carried the burden of persuasion and is clearly entitled to the relief sought a preliminary injunction should be granted. Petitioner has clearly met the burden.

As stated by this Court in Yakus v. United States, 321 U.S. 414, 440, the award of an interlocutory injunction "is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction."

It is certainly a great inconvenience for Petitioner to be deprived of earning a livelihood in his chosen profession since 1943 for no good reason and there is little or no inconvenience on the part of the Respondents herein.

As to ultimate success on the merits, one of the issues in the pending case is the prolific practice of Respondents, in waiving ABA graduation requirements in many instances, is the failure of the Respondents to have ever established any known standards so that bar admission applicants may know the criteria to be

met in order to be granted a waiver. Upon the filing of a request for a waiver in the case at bar, Petitioner learned for the first time that Respondents had a rule that a law professor may not refer to himself as a law professor but must refer to himself as a law lecturer. For failing to meet this unknown waiver requirement and similar ridiculous requirements, Petitioner was declared to be lacking in character and the waiver was denied to him.

It is obvious that Respondents adopt whatever Procrustian roadblocks may be available, rational or not, to reduce competition and thereby restrain trade and maintain high prices.

The argument of Respondents that they represent the sovereign State of Nevada and are therefore not subject to antitrust laws is to argue that a State highway policeman who robs a bank is immune from arrest because he repre-

Further, the argument of Respondents that they are either judges or acting pursuant to judicial functions and are therefore immune from accountability for any wrongdoing,is the expression of a doctrine which may be in the womb of time but whose birth is distant.

In Mitchum v. Foster, 407 U.S. 225, this Honorable Court ruled that an action under 42 U.S.C.1983 (such as the case at bar) opened federal courts to private citizens "offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." (at 239)Continuing at Page 242, the Court held that"federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights."

Furthermore, the acts complained of

were not judicial or even quasi-judicial acts but were merely ministerial or administrative acts performed by virtue of the judicial power "such as the appointment of a clerk or bailiff or the specification of eligibility or the course of study for applicants for admission to the bar rather than a judicial proceeding." (Re Summers, 325 U.S. 561.)

The Seventh Circuit case of Ktsanes v. Underwood, 560 F 2d 790 held that where the subject of the hearing (as in the case at bar) is the matter of exemption or waiver of a Supreme Court rule such a hearing is neither a judicial nor a quasi-judicial proceeding and was held to be an administrative proceeding.

Thus, the Respondents, not acting in a judicial function but only by reason of judicial power, enjoy no immunity for damages. The Texas case of McAfee v. Feller, 452 S.W. 2d 56 also held that a bar admission hearing was neither

judicial nor quasi-judicial when the board holding the hearing (as in the case at bar) had no authority to decide the matters coming before it.

Under these circumstances, any disability to proceed against the Respondents herein with regard to the alleged antitrust conspiracy under the theory that a State may not be a defendant party in antitrust complaints is negated by the decisions of this Court in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) and in Cantor v. Detroit Edison, 428 U.S. 579 (1976).

Furthermore, under the rules of Quern v. Jordan , 440 U.S. 332 (1979), it is clear that the Respondents, either as individuals or as state officials, would be answerable under 42 U.S.C.1983 for their constitutional wrongdoings.

CONCLUSION

The case at bar is a classic example of misbegotten state conduct per-

formed by persons saturated with the sweet wine of unbridled power. The perversion of justice under the pretense of protection of the public has, in this case, exceeded permissible limits and the practices complained of, undoubtedly occurring in many jurisdictions other than in Nevada, are now ripe for Supreme Court intervention and termination.

The matter of state licensing is of the greatest national importance, affecting many millions of American citizens throughout the land.

Accordingly, for all of the foregoing reasons, Petitioner urges the Court to grant this petition for certiorari, vacate the judgment of the Court of Appeals by summary disposition and remand for further consideration in light of Firestone Tire & Rubber Co. v. Risjord, decided January 13, 1981, No. 79-1420 or, alternatively, grant the

petition for certiorari so that full briefs may be filed and oral argument allowed for full consideration of the merits.

Respectfully submitted,

JOSEPH M. KADANS
5010 N. Ridge Club Dr.
Las Vegas, Nv. 89103
(702) 873-4542

Counsel of Record and
Petitioner in pro se

(Member of Supreme
Court Bar since 1943)

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 78-2500
(LV 76-128)

JOSEPH M. KADANS,

Plaintiff-Appellant,

v.

SAMUEL S. LIONEL, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the District of Nevada, Roger Foley, District Judge, Presiding.

Submitted 10/27/80

Before: BROWNING, DUNIWAY, and KENNEDY, Circuit Judges.

MEMORANDUM FILED NOV.26,1980

The orders of the court denying the motion to strike and denying the leave to file an amended complaint are interlocutory orders and not appealable. 9 Moore's Federal Practice Sec.110.07, at 108 (2d ed. 1980).

We cannot say that the district court abused its discretion in declining to issue a preliminary injunction. City of Anaheim v. Kleppe, 590 F. 2d 285, 288 n. 4 (9th Cir. 1978). Even assuming that there is juri sdiction in the case, a question as to which there is substantial doubt in view of Brown v. Board of Bar Examiners, 623 F.2d 605, 609 (9th Cir. 1980), the district court properly denied

the injunction because the likelihood of Kadans' prevailing on the merits was slight. See id.; Santos v. Alaska Bar Association, 610 F.2d 575 (9th Cir. 1980); Hackin v. Lockwood, 361 F.2d 499 (9th Cir.), cert. denied, 385 U.S. 960 (1966).

The order denying the preliminary injunction is AFFIRMED.

FILED FEB. 18, 1981

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 78-2500
DC LV 76-128)

JOSEPH M. KADANS, Appellant,

vs.

SAMUEL S. LIONEL, et al., Defendants.

Appeal from the United States District Court for the District of Nevada

Before: BROWNING, Chief Judge, DUNIWAY and, KENNEDY, Circuit Judges.

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Browning and Kennedy have voted to reject the suggestion for a rehearing en banc, and Judge Duniway has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App.P.35 (b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

JOSEPH M. KADANS, Plaintiff
v.
SAMUEL S. LIONEL, et al Defendants.

Civil-LV 76-128,RDF

ORDER DENYING MOTIONS TO STRIKE

The Motion to Strike certain portions of the Answer filed by Defendants Samuel S. Lionel, Frank Fahrenkopf, Howard McKibben, David Hagen, Thomas Beatty and Maurice Sullivan filed March 23, 1978, and the Motion to Strike certain matter contained in Motion to Dismiss and for Summary Judgment of Defendants Cameron M. Batjer, E. M. Gunderson, John Mowbray, Gordon R. Thompson and David Zenoff filed April 27, 1978 having come on for hearing on May 25, 1978, and the Court having heard arguments of counsel for the respective parties and having considered the written briefs, it is hereby

ORDERED that the Motion to Strike filed March 23, 1978 by the Plaintiff be, and the same hereby is denied.

DATED: May 30, 1978.

(signed)
Joseph L. Ward
UNITED STATES MAGISTRATE

Submitted by:
BECKLEY, SINGLETON, DE LANOY & JEMISON, Chartered

By Rex A. Jemison
Attorney for Defendants Samuel S. Lionel, Frank Fahrenkopf, Howard McKibben, David Hagen, Thomas Beatty, Maurice Sullivan
1000 First National Bank Building
Las Vegas, Nevada 89101.

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APPENDIX D

DISTRICT OF NEVADA
Las Vegas, Nevada

Joseph M. Kadans,
Plaintiff
vs.
Samuel S. Lionel, et al,
Defendants.

CIVIL-LV 76-128,RDF
MINUTES OF THE COURT
DATED: July 6, 1978

Present: Hon.Roger D. Foley,District Judge
Deputy Clerk: Linda Lea Sharer

Reporter: None appearing
Counsel for Plaintiff: NONE APPEARING
Counsel for Defendant: NONE APPEARING
MINUTE ORDER IN CHAMBERS

IT IS ORDERED that the following listed motions are denied:

1. Plaintiff's motion to strike, filed April 27, 1978.

2. Plaintiff's motion for leave to file amended complaint, filed June 5, 1978.

3. Plaintiff's motion for a temporary injunction, filed June 13, 1978.

IT IS FURTHER ORDERED that the plaintiff's objections to the ruling of the United States Magistrate, filed June 8, 1978, are overruled.

IT IS FURTHER ORDERED that the plaintiff and counsel shall have to and including July 17, 1978, within which to advise this Court in writing if they are willing to waive oral argument on the motion to dismiss and for summary judgment, filed April 10, 1978, on behalf of defendant Batjer, Gunderson, Mowbray, Thompson and Zenoff.

ENTERED July 6, 1978, Clerk, U.S. District Court By Loraine Morphy,Deputy

Carol C. Fitzgerald, Clerk
By: Linda Lea Sharer, Deputy Clerk.